

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOUGLAS L. PANETTA,

Plaintiff-Appellant,

v

RICHARD A. CASCARILLA,

Defendant-Appellee.

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UNPUBLISHED

October 3, 1997

No. 194423

Ingham Circuit Court

LC No. 96-082171-CZ

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) and (10), and imposing sanctions on plaintiff and his attorney pursuant to MCR 2.114(E). Plaintiff only challenges the trial court's imposition of sanctions. We reverse the imposition of sanctions and remand for entry of an appropriate order.

Plaintiff brought this defamation action against the attorney representing plaintiff's sister in an underlying probate action arising out of the death of plaintiff's mother. The action was founded upon a statement made in a letter written by defendant, on behalf of plaintiff's sister, to the court-appointed representative of plaintiff's mother's estate. Pursuant to an order of the probate court, all parties were required to disclose to the estate's personal representative the amount and location of any assets owned jointly between them and the deceased. In a letter to the personal representative disclosing such assets on behalf of plaintiff's sister, defendant stated, in pertinent part:

These accounts were changed at [the] request [of plaintiff's mother]. She specifically told [plaintiff's sister] to delete [plaintiff]'s name from the account because she was upset with him for continually taking her stuff out of the house whenever she went into the hospital. He continued to do so and the last time (04/28 through 05/04) she was taken home, she looked in her cedar chest and had again discovered that [plaintiff] had invaded it and that everything was not returned as she had ordered him to do. In addition, her bank books were missing and she was very upset. [Plaintiff's] mom then

told [plaintiff's sister] about additional items that were missing from the cedar chest even though she was the only one that had a key.

Defendant did not send a copy of the letter to plaintiff. In support of his defamation count, plaintiff alleged that this letter "stated or implied" that plaintiff had stolen from his mother, and that such was "entirely false." The trial court granted defendant's motion for summary disposition and "awarded" sanctions, stating in its order only that "the Court has determined that Plaintiff's Complaint is not supported by existing law."

A party's signature on a document certifies, inter alia, that:

[T]o the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law *or a good-faith argument for the extension, modification, or reversal of existing law* . . . [MCR 2.114(D)(2) (emphasis added).]

The trial court, in its order, failed to acknowledge the emphasized clause. Furthermore, a claim is only considered frivolous, inter alia, when "[t]he party's legal position was *devoid of arguable legal merit*." MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii) (emphasis added). Thus, the pertinent question with regard to the propriety of sanctions against plaintiff was whether plaintiff's positions below were *arguable*, and not whether the trial court ultimately agreed with them. *Id.*

In granting defendant's motion for summary disposition at the motion hearing, the trial court stated that (1) the letter's language was not defamatory because "the law" is not "so blind as to not recognize that" for a son to remove valuables from the house of a hospitalized elderly parent, even without her permission, may simply be an act of safeguarding for which the elderly rely on their children; (2) defendant enjoyed absolute immunity in the context of the probate proceeding; and (3) plaintiff could show no malice by defendant where the client approved of the letter's language. We address each point in turn.

(1)

With regard to whether the letter's language could have been defamatory, the trial court concluded:

Additionally, I've read the language of the [disclosure] letter. . . . In order for it to be defamation, one has to say that [defendant] accused [plaintiff] of thievery[.] And the reason I asked the question about the decedent in this case is *it seems to me to be stretching it to say* that where a son removes items from a mother's house, even against her wishes, while she is hospitalized and she is 88 years old, that that in and of itself is an allegation of thievery or theft. *I don't think* the law . . . [has] to be so blind as to not recognize that as we get older sometimes we rely on our children to protect our assets and not leave our valuables in our homes while we're hospitalized. *I don't think* it's defamation, . . .

We find that the trial court's reading of the letter is only one possibility. The letter can also be read as an accusation of theft, or at least such that the letter writer considered plaintiff's removal of his deceased mother's property from her house as underhanded and improperly against her wishes. Defendant himself admitted that the disclosure letter possibly contained "many innuendo's [sic]." Accordingly, we are not convinced that plaintiff's comparable view of the letter's language was devoid of arguable legal merit, MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii), and therefore sanctions were improper on this basis. Moreover, the trial court's statements at the motion hearing belies its implicit finding that plaintiff's defamation claim was frivolous under the circumstances. Phrases such as "it seems to me," "stretching it" and "I don't think," all indicate that the issue in question was at least arguable. MCR 2.114(D)(2).

(2)

With regard to whether absolute judicial privilege applied to immunize defendant from plaintiff's claim, it is well-settled in Michigan that statements made in the course of judicial proceedings are "absolutely privileged." *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). In this case, however, the essence of plaintiff's argument was that the law had never been applied to the exact factual circumstances alleged below, and that law should not be applied in the instant case. Plaintiff's legal theory was essentially that, where what might otherwise have been a privileged communication is made unbeknownst to its allegedly defamed subject, the usual safeguards against the abuse of absolute judicial privilege (i.e., open court, filed pleadings, etc.) are not present, and therefore the privilege should not necessarily apply. While no Michigan case has addressed the applicability of the privilege on such particular facts, plaintiff did cite supporting case law from foreign jurisdictions. In addition, defendant failed to address plaintiff's arguments for extension of the law to encompass the instance circumstances. Rather, defendant simply focuses on the propriety of the trial court's substantive conclusions. We therefore find that plaintiff presented a good-faith argument for the extension of existing Michigan law, MCR 2.114(D)(2), and sanctions were improper on this basis as well.

(3)

Finally, with regard to whether plaintiff could possibly have shown malice by defendant given that plaintiff's sister approved the letter's language, the trial court concluded:

There can be no showing of malice where, as here, the client approved of the language of the letter and it was sent to the personal representative of the estate . . . .

We know of no law indicating that an attorney is automatically absolved from allegations of defamatory malice simply because his client approved the language of a letter. Even if such an argument could be supported, defendant was not plaintiff's sister's record attorney at the time he wrote the letter, so any shield built upon "client approval" arguably would not apply. We find that sanctions were therefore improper on this basis as well.

We conclude that the trial court clearly erred when it ruled that plaintiff's complaint was violative of MCR 2.114(D), cf. *Richmond Twp v Erbes*, 195 Mich App 210, 224; 489 NW2d 504 (1992).

We therefore vacate that part of the court's order imposing sanctions, and remand for entry of an appropriate order.

Vacated in part and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra